TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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# IMMIGRATION AND FEDERAL SENTENCING POLICY

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BEFORE THE UNITED STATES SENTENCING COMMISSION

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Introduction

Chairman Hinojosa, and members of the Commission –

Good afternoon and thank you for calling these hearings. It is my privilege to appear before the Commission today to discuss the important issues surrounding immigration and federal sentencing policy. My name is Johnny Sutton, and I am the United States Attorney for the Western District of Texas. Before becoming U.S. Attorney, I served as an Associate Deputy Attorney General and was on the Transition Team assigned to the Department of Justice after the 2000 election. I also served as Criminal Justice Policy Advisor for then-Governor Bush, and was an Assistant District Attorney in Harris County, Texas—Houston—for eight years. I am currently the Acting Chairman of the Attorney General's Advisory Committee.

The re-entry of criminal aliens after deportation, aside from displaying general disrespect for our laws, presents a significant threat to public safety. The vast majority of the defendants we prosecute for re-entry after deportation have felony convictions, and a very large percentage of those defendants have multiple felony convictions. As the Sentencing Guidelines acknowledge, "[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." (U.S.S.G. Chapter Four, Part A Introductory Commentary).

Every conviction of a criminal alien represents a reduction in the risk of future crime in the United States. With this in mind, the Department believes it is important to maintain the strength of the existing sentencing guideline scheme in order to deter future criminal conduct and

incapacitate criminal aliens, thereby preventing them from committing further crimes. It is the Department's hope that amendments to immigration sentencing policy address and reflect the threat to public safety that is presented by criminal aliens who return after being deported.

The Department also believes that we can further strengthen the sentencing guidelines by making them simpler. Prosecutors, agents and probation officers spend an inordinate amount of time identifying, documenting, and researching prior convictions to determine whether they qualify as aggravated felonies. Defense attorneys must perform the same analysis, and eventually judges must do so as well. If a case proceeds to sentencing, the process begins anew to determine not only whether a particular conviction qualifies as an aggravated felony, but also to determine which, if any, of the enhancements set forth in §2L1.2 of the Sentencing Guidelines will apply in the case. As the *Interim Staff Report* notes, the application of §2L1.2 does not always depend on whether a crime qualifies as an "aggravated felony." This is especially true in the context of the definition of "crime of violence" in the statute and in §2L1.2.

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It is important to put these proposals and hearings in context. Our position regarding amendments to the Guidelines is part of a comprehensive strategy addressing border security. As President Bush recently stated,

"Keeping America competitive requires an immigration system that upholds our laws,

reflects our values, and serves the interests of our economy. Our nation needs orderly and secure borders. To meet this goal, we must have stronger immigration enforcement and border protection. And we must have a rational, humane guest worker program that rejects amnesty, allows temporary jobs for people who seek them legally, and reduces smuggling and crime at the border."

To achieve these goals, the Administration, working with Congress, has been seeking ways to improve border security, discourage and prevent illegal entries, and hopefully, as a result, reduce the number of such cases brought before the courts. We are using new technologies to detect and identify individuals attempting entry at our borders and to discourage anyone from entering except at authorized entry points. We have increased security, particularly here in the southwest, where we have increased, and will continue to increase, the number of federal agents who patrol the border.

Just recently, the President signed the Department of Homeland Security Appropriations Bill, which provides funding for an additional 1,000 Border Patrol agents. Increased funding will allow Immigration and Customs Enforcement ("ICE") to add roughly 250 new criminal investigators to better target human smuggling organizations. It will also allow ICE to add 400 new Immigration Enforcement Agents.

The Department is also working with Congress on a number of proposals to amend the criminal and civil provisions of the Immigration and Nationality Act as well as Chapter 75 of

Title 18, which deals with passport and visa violations.

In addition, the Administration has expanded detention and removal capabilities to eliminate "catch and release," and has greatly increased interior enforcement of our immigration laws, including increased worksite enforcement. In the Del Rio Division of the Western District of Texas, my office has worked closely with Border Patrol and U.S. Customs and Border Enforcement to carry out Operation Streamline II, a "no tolerance" approach to illegal entrants without inspection. Border Patrol was apprehending a large number of aliens from South and Central America in the area who were surrendering voluntarily to secure their release into the United States pending removal hearings. The vast majority of those released disappeared into the interior and did not return for the scheduled hearing. With a view to ending this "catch and release" practice and to deterring illegal entry in the Eagle Pass area, we began prosecuting all undocumented aliens apprehended in certain zones between Eagle Pass and Del Rio, Texas, for misdemeanor entry without inspection. From late December 2005, when the operation began, through late February, more than 1,600 illegal entrants have been prosecuted under this operation.

Of course, prosecution is an important component of border strategy and the one most relevant to today's hearing. As your statistics reveal unequivocally, the number of immigration cases has steadily increased over the last decade, so that now immigration and related cases dominate the work of the courts along the southwest border and account for about 22% of the entire federal criminal docket. In the Western District of Texas, for example, from Fiscal Year

2002 through Fiscal Year 2005, felony immigration cases have increased from 35.3% of our docket to 54.2% of the docket. During that period, the total number of immigration felonies increased from about 1,400 to over 2,700 cases. The vast majority of those cases involve illegal re-entry after deportation or removal. The Department as a whole also continues to see increases in the number of re-entry cases prosecuted. Between 2001 and 2005, the number of such prosecutions rose by some 59%. We expect this trend to continue if not accelerate.

Although we hope to reduce the number of new cases through the deterrence factor that accompanies increased border security, we recognize that the number of new re-entry cases continues to rise, in part as a result of our ever-improving ability to identify returning criminal aliens. Along the southwest border, the staggering and ever-increasing number of these types of cases has forced U.S. Attorneys to develop innovative strategies to handle our caseloads. We are doing all we can to maintain our ability to prosecute every deserving case by maximizing the efficient use of our finite resources. To that end, some of our offices employ Attorney General-approved Early Disposition Programs, as authorized by Section 401(m) of the PROTECT Act and §5K3.1 of the Sentencing Guidelines.

To be effective in protecting the public, we must assure that returning criminal aliens are caught and that they receive appropriate and proportional punishment. With the staggering number of immigration cases now being prosecuted, we believe the goals of this guideline amendment cycle should include ensuring that the guidelines account for the risk factors and aggravating circumstances that are presented by returning criminal aliens. By accounting for

such risks and aggravating circumstances, deterrence and incapacitation can be targeted where they are most needed. At the same time, we are keenly aware of the burdens the large numbers of these cases place on all elements of the criminal justice system and the need for sensible reform that simplifies application of §2L1.2 in a fair manner in order to relieve the litigation burden on participants in the sentencing process.

The Department believes that the options described in the January 25th *Proposed Amendments to the Sentencing Guidelines* are a step in the right direction toward achieving these goals. We believe further improvement can be attained by simplifying the guideline to eliminate the *Shepard/Taylor* categorical approach altogether in the guideline sentencing context, or by avoiding the creation of unduly narrow categories of application.

Amendments to §2L1.2

Let me now turn to the proposed amendments to §2L1.2 As the *Interim Staff Report* notes, under this section, the current specific offense characteristics require duplicate and sometimes conflicting analysis when first determining the statutory maximum penalty and then determining which, if any, of the specific offense characteristics apply under §2L1.2. Indeed, the categorical analysis has led to counter-intuitive, if not capricious results in some cases, allowing bad actors to avoid appropriate punishment on seemingly technical grounds. Let me give a few examples from my district that I think are informative.

In one case, the defendant had a prior conviction for aggravated battery under Illinois law. Although that prior conviction involved nearly strangling his victim with a rope, we had to take the position that his conviction was not a "crime of violence." Under Fifth Circuit authority applying *Shepard*, aggravated battery under Illinois law is not a crime of violence because it can be committed without the use or attempted use of force. Although the prior crime was clearly "violent," the defendant was not subject to the 16-level adjustment under the guideline as presently formulated.

In another case, we had to concede that an assault of a police officer under Texas law was not a "crime of violence" even though the defendant conceded that he gave the arresting officer a "headbutt" to the eye, tore a ligament on the officer's thumb, and kicked the officer in the shin while resisting arrest. Because the offense could have been committed without the use of force, the prior conviction did not satisfy the categorical test for a crime of violence. Again, we were compelled to concede that the 16-level adjustment did not apply to an undisputedly violent offender.

*Taylor/Shepard* Analysis

The analysis of qualifying convictions is performed according to the Supreme Court's decisions in *Taylor v. United States*, 495 U.S. 595 (1990), and *Shepard v. United States*, 125 S. Ct. 1254, 1261 (2005). Under these decisions, a conviction qualifies as an aggravated felony or triggers a specific offense characteristic only (1) if the statute of conviction fits within the

definition of the qualifying offense (for instance, the "modern generic" definition of "burglary"), or (2) if the statute of conviction contains offenses that fall within the definition and others that do not, and limited judicial records establish that the conviction was for an offense that fits within the definition. This analysis is cumbersome, and obtaining the necessary records is a time-consuming process for prosecutors, defense attorneys and probation officers.

In addition, the categorical analysis has sparked a seemingly endless wave of litigation in the trial and appellate courts. Eliminating the need for this analysis would greatly reduce the workload for participants in the sentencing process and improve the efficiency and reliability of sentencing determinations.

The Department favors moving towards a system in which the length of the prior sentences is the guiding factor. Such a system could still include enhancements for prior convictions for certain serious offenses such as murder, rape, kidnaping or terrorism. Defendants who believe their sentences were unduly harsh in the underlying case and therefore trigger too stiff an enhancement could move for downward departures and rely on the reports and other records in the underlying case to support their requests, similar to current practice.

Option 1

Of the options presented by the Commission to address the categorical approach, the Department favors Option 1, with one modification. This option requires an aggravated felony conviction to trigger the enhancements in subsections (b)(1)(A), (B) & (C) of §2L1.2. As the

*Interim Staff Report* notes, this would result in only one categorical analysis being performed, but would not do away with that analysis entirely.

However, as proposed, this option may create an unduly narrow class of cases subject to the enhancement in subsection (b)(1)(B) through the use of the term "aggravated felony" in that subsection. Many of the crimes included as "aggravated felonies" in 8 U.S.C. § 1101(a)(43), including crimes of violence, theft and burglary offenses, require a sentence of at least 12 months of imprisonment to have been imposed in order to qualify. As a result, a requirement that a conviction be an aggravated felony to trigger the enhancement in subsection (b)(1)(B) means only defendants who received a sentence between 12 and 13 months of imprisonment would be subject to that specific offense characteristic. We would submit that this is not a large enough class of repeat criminals to justify a special guideline enhancement. We think a better option would be to drop the word "aggravated" from subsection (b)(1)(B), which would result in enhancements ranging from four levels, for those defendants convicted of three or more misdemeanors or ordinary felonies with a sentence of probation; to 16 levels, for defendants convicted of aggravated felonies with sentences of imprisonment exceeding 13 months.

Option 2

Option 2 is very similar to Option 1 with the exception of raising the threshold for imposing the 16-level enhancement in subsection (b)(1)(A) to 2 years of imprisonment (requiring the sentence to exceed 2 years), and adding a threshold of more than 12 months of imprisonment to subsection (b)(1)(B). This option will broaden the window of defendants who

are subject to the 12-level enhancement set forth in subsection (b)(1)(B) discussed above. Under this scheme, we would continue to support the elimination of the word "aggravated" from subsection (b)(1)(B).

Option 3

Option 3 retains the aggravated felony requirement but broadens the window for application of the enhancement in subsection (b)(1)(B) by reducing the threshold for that subsection to 60 days instead of raising the threshold for applying the enhancement in subsection (b)(1)(A) to 2 years. Again, under this option we would maintain our objection to including the requirement of an aggravated felony conviction to trigger the enhancement in subsection (b)(1)(B).

Application Notes for Options 1, 2 and 3

If the Commission were to adopt Option 1 or 2, we would generally support amendments to the commentary that accompany those options. However, the proposed Application Notes may create a gap in terms of determining whether prior convictions are to be counted if they are not counted under §4A1.1. Proposed Application Note 1(B)(iv) notes that sentences of imprisonment are counted "without regard to the date of conviction." We note that no corresponding note addresses whether convictions without terms of imprisonment are counted "without regard to the date of conviction."

Option 4

Option 4 is very similar to the present guideline in that it applies the enhancements in subsections (b)(1)(A) and (b)(1)(B) only to certain types of crimes, but it adds the requirement of an aggravated felony conviction to trigger those enhancements. This option would streamline the categorical analysis by referring to appropriate subsections of the aggravated felony definition in 8 U.S.C. § 1101(a)(43) rather than setting forth separate definitions in the guideline. As a result, only one categorical analysis would apply, and the enhancements would apply only to certain aggravated felonies. Option 4 adds a threshold of greater than 13 months of imprisonment to crimes of violence in subsection (b)(1)(A). Option 4 also adds crimes of violence with a sentence of imprisonment of less than 13 months to subsection (b)(1)(B).

We would point out that including the word "aggravated" in subsection (b)(1)(A) is unnecessary, because the amendment in Option 4 would make it so that the crimes listed in subsection (b)(1)(A) are aggravated felonies by definition. On the other hand, including the aggravated felony requirement in subsection (b)(1)(B) in this formulation would narrow that enhancement to (1) drug trafficking convictions with less than 13 months of imprisonment and (2) crime of violence convictions with between 12 and 13 months of imprisonment. Again, this narrow class of violent crime convictions is too small to warrant its own guideline enhancement. Removing the word "aggravated" would make subsection (b)(1)(B) applicable to all crimes of violence with a sentence of imprisonment. This result would be more appropriate because persons convicted of crimes of violence and sentenced to terms of imprisonment pose a greater risk to society and should receive sentences similar to those imposed on persons convicted of

drug trafficking crimes, and stiffer sentences than those imposed on persons convicted of other non-violent offenses.

Option 5

Option 5 removes all references to types of convictions. This option is attractive in its simplicity, as such a scheme would certainly eliminate the problems with the categorical approach. However, it may raise other potential issues for litigation regarding burden of proof.

Federal Defenders Proposal

The Federal Defenders proposal would significantly weaken the guideline by reducing the maximum total offense level for all offenders other than convicted terrorists to Level 16. This would be counterproductive in that it would remove the deterrent and incapacitating effect that is present in the existing guideline. Moreover, the proposal would raise the burden on the government to establish multiple aggravated felony convictions to trigger a lower maximum enhancement for aggravated felonies and would retain the requirement of performing different categorical analyses to determine whether a conviction qualifies both as an aggravated felony and as a qualifying offense under the incorporated guideline definitions in the proposal. Weakening the guideline in this fashion would be contrary to the will of Congress, as expressed in its increase to the penalties in § 1326 as part of the Violent Crime Control and Law Enforcement Act of 1994, and in its directive to the Commission in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to increase the base offense level in §2L1.2.

Subsection (b)(1) of the Federal Defenders proposal would entitle a defendant to a reduction in the base offense level if the defendant returned or remained to visit immediate family for such purposes as securing medical treatment or humanitarian care or if the family member is in extremis. Likewise, the proposal would entitle a defendant to a reduced offense level if the defendant returned to or remained in the United States because of cultural assimilation. These are matters best left to Congress in the first instance.

At present, the immigration laws make no provision for aggravated felons to return to the United States under any circumstances. Building a reduction into the Sentencing Guidelines for these purposes would contradict the expressed will of Congress. Second, captioning these reductions in the form of entitlements is inappropriate. In truly extraordinary cases, where the guidelines do not fully take into account the facts and circumstances of a particular defendant's situation, courts have the flexibility to fashion an appropriate departure from the guideline range.

Drug Trafficking Offenses With Sentences of Probation (Interim Staff Rept. Issue 2)

As for the remaining issues for comment, the Department believes expressly requiring terms of imprisonment to trigger the enhancements in subsections (b)(1)(A) and (b)(1)(B) would adequately address the issue of drug trafficking offenses resulting in sentences of probation.

Prior Convictions for Simple Possession Where the Quantity Exceeds Personal Use

Likewise, the proposals adequately address the application of §2L1.2 to felony simple possession convictions involving large quantities of narcotics that clearly would be intended for

distribution. Adopting a separate category for such offenses would be very difficult to apply in practice due to the restrictions imposed in the *Taylor* and *Shepard* decisions. Placing imprisonment thresholds on the enhancements in subsections (b)(1)(A) and (b)(1)(B) provides a fair and objective method for ensuring that less-serious offenders will be much less likely to face those enhancements based purely on a personal-use drug conviction.

Criminal History and "Double Counting"

With regards to Criminal History calculations, we believe the present system of imposing adjustments under the §2L1.2 for all convictions regardless of date is consistent with the scheme adopted by Congress in § 1326 and expressed elsewhere in the immigration statutes. Simply put, Congress has made it clear that individuals convicted of aggravated felonies are barred from returning without express consent for the remainder of their lives. The penalties in § 1326 are not time-dependent, and neither should those in §2L1.2.

The age of a conviction remains a factor in determining whether the conviction adds to a defendant's criminal history score, which ameliorates the effect of "double-counting." Addressing the conviction as part of the offense-level calculation as well as the criminal history score is an appropriate measure to reflect the will of Congress. This scheme is consistent with the structure of other guidelines, such as the firearms guideline in §2K2.1, that provide offense level enhancements for prior convictions without barring consideration of those convictions to add to a defendant's criminal history score. We believe the current structure is appropriate and need not be amended.

Conclusion

That concludes my remarks for today. I thank you for this opportunity to address the Commission on these important issues, and I particularly commend your staff for diligently listening to the views of the Department, public defenders, judges, probation officers, and others in preparing their *Interim Staff Report* and developing the various options that we are discussing today.